

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL FIRST APPEAL No. 3 of 1984

LR'S OF GHEWAR CHAND
V/S
SMT. RAMI & ORS.

Mr. RR NAGORI, for the appellant / petitioner

Mr. M.R. SINGHVI, for the respondent

Date of Order : 12.9.2006

HON'BLE SHRI N P GUPTA, J.

ORDER

This appeal has been filed by the plaintiff, against the judgment of the learned trial court, whereby the suit for recovery of Rs.12,900/- has been dismissed.

The fact of the case are that on 26.2.1980, the plaintiff filed the present suit, against three defendants, alleging inter-alia, that defendants no. 2 and 3 are minors and are living under guardianship of their natural guardian, mother. Then it was pleaded, that on 19.2.1977 the defendant no. 1 approached the plaintiff, expressing need of money for purchasing fodder, and offering to start making repayment after six months, whereupon the plaintiff advanced Rs.9,500/- to her, for which a Khata was executed by her, and for plaintiff satisfaction, she also handed-over a Patta of her house to the plaintiff. The rate of interest was agreed to be paid on this amount @ 1.50 % per month. According to the plaintiff despite expiry of six

months when the plaintiff demanded the amount, no payment was made, even registered notice did not yield any returns, thus the suit has been filed, claiming principal amount, alongwith interest and with expenses, totaling to Rs.12,900/-.

The defendant No.1 remained exparte, and court guardian was appointed for minor defendants no. 2 and 3. The court guardian had filed a written statement, denying any loan having been taken by the defendant No.1, and the allegation of delivery of Patta to the plaintiff by the defendant No.1 was also denied, for want of knowledge. Then in additional pleas, it was pleaded that the defendants are agriculturists, and since the geographical area is affected area, having been notified by the State Government, in view of the provisions of Section 5 of the Affected Area Suspension of Proceedings Act, suit cannot be maintained. Other objection was taken about the plaintiff being money lender, and that from perusal of Khata, it appears, that old outstandings have been converted into cash loan, and that the defendant No.1 being illiterate lady, she may have executed the Khata, under influence of the financier, the plaintiff, which is without consideration, and defendants are not liable for that. Then the objection about absence of money lending license with the plaintiff, and non-compliance of the provisions of Sections 22 and 23 of the Money Lenders Act was also taken, rate of interest was claimed to be excessive, and prayer

for installment was also made.

Learned trial court framed seven issues, out of which, issue No.2 related to the defendants being agriculturists, which issue was decided vide order dated 3.8.1981, against the defendants, holding them, not to be agriculturists. Then after completing the trial, learned trial court dismissed the suit as above.

Deciding issue No.1, relating to advancement of loan, and execution of Khata, it was found to have been proved, that the loan of Rs.9500/- was advanced to the defendant on 19.2.1977, stipulating interest to be payable @ 1.50% per month, and the defendant No.1 being natural guardian of defendants No. 2 and 3. Then issue No.4, relating to the consequences of absence of money lending license, and non-compliance of the provisions of Sections 22 and 23 of the Money Lenders Act was decided against the defendant, for want of evidence, then in view of issue No.2 having been decided earlier, the issue No.3 was also decided against the defendants. Then deciding issue No.5 it was found, that the rate of interest is excessive, and even on the face of the language of Section 29 of the Money Lenders Act, maximum interest, that could be charged, could be @ 9% per annum only. Then while deciding issue No.6, regarding defendants' entitlement to installments, the learned trial court considered the question of limitation, by observing, that though no specific issue has been framed

in this regard, but then, the arguments have been heard on this question, more than once, and since the parties have already led evidence, the question of limitation was considered. While so considering it was found, that according to the plaint, the defendants stipulated to commence repayment of loan after six months. While defendants No. 2 and 3 have denied, then the contents of the document, Ex.-1, were reproduced in extenso, and then considering the document, it was found, that the document clearly stipulates, that the interest will be payable, six monthly, and does not stipulate, that repayment of loan will commence after six months. With the result, that the suit is governed by provisions of Article 19, and not Article 28 of the Limitation Act. Consequently, the suit having been filed after three years, calculated from 19.2.1977, was found to be barred by time. Consequently despite decision of issues No. 1 and 5 in favour of the plaintiff, the suit was dismissed.

Assailing the impugned judgment and decree it was contended by the learned counsel for the appellant, firstly that, the learned trial court has not correctly construed the document Ex.-1, and from its proper appreciation and construction, it is clear, that the repayment of loan was to commence after six months, thus the suit is within time. It was then contended, that a look at the record shows, that in para 2 of the plaint it was specifically pleaded by the plaintiff, that the defendant No.1 while demanding loan

offered, that she would start repayment after six months, which offer was accepted, and loan was advanced. Then in para 4 also cause of action has been claimed to have commenced after expiry of six months from the date of advancement of the loan, while the defendant No.1 has not even filed any written statement, to controvert the plaintiff averments, and defendants No. 2 and 3 have simply denied the execution of Khata itself. Not only this, when the plaintiff appeared in the witness-box, he was cross-examined on the side of the defendant No.1, by her counsel, and since plaintiff had clearly deposed in his examination-in-chief, that the amount was stipulated to be repaid after six months, and on this part of the evidence, there is no cross-examination whatever, on the side of defendant No.1, and even in cross examination on behalf of the other defendants, plaintiff has maintained, by deposing the suggestion, about there has been no stipulation to commence repayment of loan after six months, to be wrong. Then defendant No.1 herself appeared in witness-box as DW-1, and in her statements also, she has not denied the stipulation, as pleaded in the plaint, and has simply denied Ex.-1 itself. In such circumstances, according to the learned counsel, on the principle of non-traverse, the suit could not be dismissed, as the suit is governed by the provisions of Article 28, and not Article 19 of the Limitation Act.

The learned counsel placed reliance on the judgments of the Hon'ble Supreme Court, in Badat and Co.,

Bombay Vs. East India Trading Co., reported in AIR 1964 SC 538, and in Sheikh Abdual Sattar Vs. Union of India, reported in AIR 1970 SC 479. Learned counsel for the appellant also relied upon the provisions of Order 8 Rule 5 (2) C.P.C., and contended on that basis, that where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment, on the basis of the facts contained in the plaint, and therefore also, the suit was required to be decreed, as against the defendant No.1.

On the other hand, learned counsel for the respondent supported the impugned judgment, by contending, that there is no ambiguity in the document Ex.-1, the document has rightly been considered and construed by the learned trial court, the clear stipulation in the document is, that the defendant will pay interest six monthly, and there is no stipulation, that the repayment of the loan will commence after six months. It was also contended, that in view of the provisions of section 3 of the Limitation Act, even if there is no specific defence taken on the side of the defendant, about limitation, the duty of the court is to dismiss the suit, if it is barred by limitation, and therefore, the question of limitation was required to be, and has rightly been, gone into by the learned court below. It was also contended, that since stipulation of the parties are contained in writing, in Ex.-1, it was not open to the plaintiff to take any contrary stand, and therefore, even if a pleading has been

taken, about there being any stipulation to start repayment after six months, even if that pleading has not been converted, that cannot be gone into.

I have heard learned counsel for the appellant and considered the submissions.

Coming to the judgments of the Hon'ble Supreme Court first; the legal principle propounded therein do not admit any controversy, and therefore they need not detain me any more.

So far the provisions of Order 8 Rule 5 (2) are concerned, which reads as under :-

"5(2)- Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved."

A Look at the above provision shows, that it is always in the discretion of the Court, notwithstanding the defendants having not filed its pleading, to require the fact to be proved. In that view of the matter, when the parties have gone to trial, this provision is also of not much assistance to the plaintiff.

Coming to the merits, the core question in this case is, as to whether the suit has rightly been dismissed

as time barred, or it is required to be decreed?

Of course, defendant No.1 has remained exparte, and then appears to have participated in the proceedings, as the plaintiff witnesses have been cross-examined on her behalf, and she herself also appeared in the witness box, but then, the question still remains, as to whether the question of limitation is required to be decided, simply on the basis of the averments of the plaint, and its non-traverse, altogether oblivion of the contents of the document, which is the basis of the suit of the plaintiff. It is writ large, that the defendant No.1 is an illiterate lady, and has found by the learned trial court to have executed a Khata Ex.-1, which also bears thumb impression thereon. Even according to the plaintiff, this Khata has not been scribed by the plaintiff, but scribed by PW-3. It is not known, as to what relationship plaintiff stand to PW-3, inasmuch as, the plaintiff has only deposed the writing of Indermal, and Indermal has only deposed, the writing to be his own, and the plaintiff and defendant No.1 being his acquaintance. The Khata is a book of account of the plaintiff, and it does not stand to reason, that any Tom Dick and Harry would be entitled to write anything on the books of account of the plaintiff, thus it appears, that the document was got scribed by the plaintiff, and was thumb marked by the defendant. Notwithstanding this, had it been stipulated, as contended by the plaintiff, that the repayment of loan was to commence after six months, nothing

prevented the plaintiff in incorporating this stipulation in Ex.-1. Even according to the plaintiff, execution of Ex-1, and advancement of loan, is a simultaneous event, the plaintiff was careful enough, to retain the patta of the defendants' house, to secure the loan, therefore also, if it was stipulated, that the repayment is to commence after six months, in my view, it was required to be incorporated in Ex.-1, and absence of such stipulation in Ex.-1, is a million dollar circumstance, against reliability of such stipulation, having been stipulated, as sought to be deposed by the plaintiff. True it is, that the defendant has not filed any written statement, and true it also is, that on the side of the defendant No.1, no cross-examination is directed on this part of the evidence of the plaintiff, but in my view, that cannot entitle the plaintiff to compel the court, to believe bare ipse dixit of the plaintiff, on its face value. At this stage, I may refer to the statement of DW-1 also, who has been cross-examined on the side of the plaintiff, and significantly not a word has been put to her, on the side of the plaintiff, that she had ever stipulated to commence repayment of the loan after six months. Had the stipulation being there, the minimum expected of the plaintiff was, to put it to the other side in cross-examination, during trial. This having not been done, coupled with the circumstances found above, I am at one with the finding of the learned trial court, that there was no such stipulation, stipulated at the time of advancement

of loan, that the repayment will commence after six months.

That being the position, the suit has rightly been found to be covered by the provisions of Article 19, and has rightly been dismissed.

It was then contended, by the learned counsel for the appellant, that the learned trial court was in error in directing the plaintiff, to return the Patta to the defendant No.1. It was contended that there was no prayer made on the side of the defendant, in this regard, at any stage of trial, and thus this part of the decree is wholly without jurisdiction.

I have considered the submission, and from perusal of the record, it clearly transpires, that this part of the direction has been added by hand, at the end of the judgment, as well as on the decree also. In the decree-sheet, this part is scribed by different hand, and different ink, it clearly appears to be a post script addition. Obviously, in absence of any request on the side of the defendant, this part of the decree cannot be sustained.

Accordingly, the appeal is dismissed having no force, except the modification, that the direction to the plaintiff, to return the Patta, to the defendant, would stand deleted.

The parties shall bear their own costs.

(N P GUPTA), J.

/rm/